IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 260

NORTH CAROLINA NATURAL GAS CORPORATION,
Petitioner,

v.

McJUNKIN CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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July 17, 1962.

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North Carolina Natural Gas Corporation, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 19, 1962, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated April 10, 1961, is not reported. The opinion of that court on rehearing, dated March 19, 1962, is reported at 300 F. 2d 794. These opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals entered on rehearing is dated March 19, 1962. This judgment was entered following a hearing on a petition for rehearing of a judgment and opinion previously entered on June 12, 1961. On June 11, 1962, Mr. Chief Justice Warren signed an order extending the time for filing this petition for a writ of certiorari to and including July 17, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court, in a diversity suit for anticipatory breach of a contract, may formulate and apply its own standards as to interpreting the contract and measuring damages, or whether *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, requires such court to discover and apply the applicable state law as to such matters.

2. Whether a federal court may, in directing a verdict in favor of the party having the burden of proof, substitute its own inferences and conclusions instead of viewing the evidence in a light most favorable to the opposing party to determine if a jury could rationally have found in the opposing party's favor.

STATEMENT OF THE CASE

HISTORY OF THIS LITIGATION

The respondent McJunkin Corporation brought this breach of contract action against the petitioner North Carolina Natural Gas Corporation in the United States District Court for the Eastern District of North Carolina. Jurisdiction was grounded upon the parties' diversity of citizenship.

The complaint alleged an anticipatory breach of a contract for the purchase of steel pipe and damages resulting therefrom. North Carolina by answer denied all allegations, including a denial of the existence of such a contract.

The case came on for trial before a jury. At the conclusion of McJunkin's evidence, North Carolina moved orally for a directed verdict; the motion was denied. North Carolina then presented its evidence. When both parties had rested, North Carolina moved (1) for a directed verdict, (2) for certain instructions to be given to the jury, and (3) for the submission of the issues to the jury. All these motions were denied.

McJunkin then moved for a directed verdict in its favor, which motion was granted over North Carolina's objection. Thereupon the jury, as directed, returned a verdict awarding judgment to McJunkin in the sum of $123,493.88. North Carolina's subsequent motion (1) to set aside the verdict and enter a judgment n.o.v. in its favor, or, alternatively, (2) for a new trial, was denied.

The Court of Appeals for the Fourth Circuit originally affirmed the judgment in McJunkin's favor on June 12, 1961. A rehearing was granted on North Carolina's motion, the petition alleging that the court had misapplied the substantive law of damages. After further briefing and oral argument on the rehearing, the Court of Appeals issued a new opinion on March 19, 1962, and reaffirmed the judgment in McJunkin's favor. 300 F. 2d 794. As to the problem of damages, which had formed the basis of the rehearing, the Court of Appeals concluded (p. 20a, *infra*):

> "Since we decide this question of amount of discount on the basis of insufficiency of evidence,

it is not necessary to decide what measure of damages rule is applicable, or whether the law of North Carolina or West Virginia applies."

RELEVANT FACTS

At the trial, the following relevant facts were established:

1. McJunkin is a West Virginia corporation, with principal offices in Charleston, West Virginia. It is engaged in the business of selling steel pipe products as a discount or commission broker, purchasing such products from the steel mills at a discount. North Carolina is a Delaware corporation with executive offices in Fayetteville, North Carolina. It is engaged in the business of natural gas transmissions and distribution in eastern North Carolina.

2. From the Fall of 1956 through the Summer of 1958, North Carolina was attempting to procure financing for construction of a pipe line system in North Carolina, having acquired the necessary federal and state authorization. Looking toward the time when such financing might be secured, North Carolina sought during this period to line up the necessary steel pipe for the pipe line. The main problem in that connection was the acquisition of certain sizes of high-grade thin wall pipe, known as "X-grade."

3. North Carolina entered into negotiations with McJunkin, during the course of which McJunkin was made aware of North Carolina's special pipe requirements and its concurrent efforts to obtain the necessary financing. Various oral and written communications were exchanged between agents of the two corporations over a period of approximately one year with regard to the supplying of North Carolina's pipe requirements:

(a) **March 29, 1957.** Following preliminary meetings and correspondence, North Carolina's engineer wrote to the vice-president of North Carolina that he felt McJunkin could meet North Carolina's requirements. This letter included specifications for pipe, quantities, sizes, terms, delivery dates and the statement that the cost would be mill price at time of shipment plus freight from the nearest competitive mill. Tr. 25.

(b) **April 9, 1957.** North Carolina's vice-president wrote McJunkin that its proposal "relative to the pipe for the North Carolina project to be shipped to his [the engineer's] specifications and construction date requirements is hereby accepted." Pl. Ex. 2.

(c) **April 12, 1957.** North Carolina's vice-president wrote the company's engineer, notifying him of the "acceptance" of McJunkin's proposal. Tr. 132.

(d) **June 11, 1957.** North Carolina's engineer was advised by the vice-president that McJunkin would be unable to supply the 16" pipe included in the former proposal and that such pipe would have to be obtained elsewhere. Tr. 132.

(e) **July 3, 1957.** McJunkin sent North Carolina a complete and formal quotation (known as No. P-2469) of all prices on its pipes, including specifications, unit prices, terms, delivery dates and quantities. Size 16" pipe was included, and the quantities for several other sizes were different from those in the original March 29 proposal. Pl. Ex. 1. These quotations, however, were subject to home office approval. And they resulted from McJunkin's position that the previous communications had not sufficiently "spelled out" McJunkin's commitments. North Carolina agreed that it would be appropriate to put down in writing "what

you feel you can offer, so that we will be completely clear on it, and we will follow up with a detailed order."

(f) **July 11, 1957.** North Carolina's vice-president wrote McJunkin "cancelling" requirements for 16" pipe and adding: "Please accept this letter as your purchase order for our pipe requirements as outlined hereafter and in general accordance with your quotation Number P-2469." There then followed the same figures as appeared in the July 3 quotations, specifying delivery dates and quantities. The last sentence read: "Will you please accept this order." Pl. Ex. 2.

(g) **July 15, 1957.** McJunkin placed six purchase orders for pipe, referred to as being for North Carolina's requirements, with Jones & Laughlin Steel Co. Jones & Laughlin acknowledged and accepted these orders on August 5, 1957. Tr. 35-36.

(h) **July 16, 1957.** A McJunkin agent notified North Carolina's engineer by telephone that McJunkin could not supply the "X-grade" pipe included in both the March 29 and July 11 letters. Tr. 93-95.

(i) **July 17, 1957.** North Carolina's vice-president wrote McJunkin "cancelling" its order of 10" and 12" pipe because McJunkin was unable to place this order with the mills. A repetition of the 16" pipe cancellation was also included. Pl. Ex. 3.

(j) **August 5, 1957.** McJunkin wrote North Carolina to thank it for the July 11 order "accepting our quotation P-2469 for your pipe requirements." The letter also stated that the two items mentioned in the July 17 communication had been deleted. Pl. Ex. 4.

(k) **September 24, 1957.** McJunkin wrote Jones & Laughlin indicating that it had placed orders with

Jones & Laughlin for the North Carolina pipe requirements and stating, "At the present time delivery on this project depends on funds being made available." Pl. Ex. 17; Tr. 34.

(l) **October 9, 1957.** McJunkin wrote Jones & Laughlin that it had been informed by North Carolina that the latter would not want any pipe prior to January 1, 1958. Tr. 38. This letter reflected the fact that in the Fall of 1957 it had become known to all parties that financing the construction of North Carolina's pipe system could not be accomplished on the basis of the plans then in effect. A complete change of the system was required, including major changes in pipe requirements, and that change was not completed until early in 1958. Such changes were communicated to McJunkin prior to May 27, 1958. Tr. 148-153.

(m) **May 27, 1958.** North Carolina's vice-president wrote McJunkin "cancelling" the pipe ordered on July 11, 1957, and stating further that this was to cancel "the entire remainder of the order." Pl. Ex. 9. On the same day, McJunkin wrote North Carolina's engineer that McJunkin now understood North Carolina's "revised pipe requirements" were as set forth therein, adding:

> "In the event the North Carolina Natural Gas Corporation completes financing and proceeds with construction this year (1958), and on the basis of a firm non-cancellable order, we agree to furnish these pipe requirements at the competitive delivered prices to jobsite, based on domestic shipment of API pipe. . . .
>
> "This offer is subject to acceptance by May 29, 1958." D. Ex. 1; Tr. 54, 135.

(n) **May 29, 1958.** Agents of McJunkin visited North Carolina's vice-president; they discussed the contents of McJunkin's May 27 letter and the possibility of further discount concession to North Carolina if it would place an order for all its pipe requirements with McJunkin immediately. Tr. 212-214.

(o) **June 3, 1958.** McJunkin wired North Carolina of its non-acquiescence in the "cancellation" of May 27, 1958. Pl. Ex. 10; Tr. 33. Thereafter various exchanges between the companies reiterated North Carolina's "cancellation" and McJunkin's intention to hold North Carolina to its "order." McJunkin declined to submit any quotations for North Carolina's new pipe requirements. Tr. 120.

4. North Carolina placed orders for its new pipe requirements with other suppliers. It received its new financing in mid-October, 1958, and proceeded immediately to order delivery of its pipe requirements as its construction project demanded. It received approximately 58% of its total pipe requirements prior to January 1, 1959, and the balance in 1959. Tr. 164-166, 212-213.

5. McJunkin stood to profit on any consummated sale of pipe to North Carolina ordered from producers at the rate of a 5% "functional discount" on shipments prior to January 1, 1959, and at a rate of a 3% "functional discount" on shipments on and after January 1, 1959. Tr. 62-63, 112, 163-164.

This suit was instituted on September 15, 1958, and trial commenced on October 20, 1960. On the basis of the foregoing facts, the Court of Appeals affirmed the directed verdict in McJunkin's favor and held:

(1) That McJunkin's quotation of July 3, 1957, North Carolina's letter of July 11, 1957, and McJunkin's communication of August 5, 1957, constituted the contract. The court thereby rejected North Carolina's claim that there was sufficient evidence to permit the jury to infer, alternatively, (a) that the parties had never entered into a contract because a precondition to North Carolina's "acceptance" of McJunkin's "offer" was the securing by North Carolina of its necessary financing, and the so-called revocation occurred before that event, or (b) that the contract was executory in nature, specifically conditioned on the right of the parties to cancel unilaterally at any time prior to North Carolina's financing or the actual commencement of pipe production.

(2) That the contract was breached by North Carolina in its letter dated May 27, 1958.

(3) That the damages were to be measured entirely on the basis of the 5% "functional discount" which McJunkin would have received on pipe shipments made prior to January 1, 1959. The court thereby rejected North Carolina's claim that the proper rule of damages for such an anticipatory breach of contract, where the actual time of performance is demonstrable by the time of trial, is the actual profit realizable at such time of performance; here there was proof that the actual time of performance depended upon the securing of financing by North Carolina; and upon the occurrence of that event North Carolina promptly secured 58% of its pipe prior to January 1, 1959, and the remainder during 1959. Hence, under North Carolina's theory, the jury could have found that 58% of McJunkin's damages were measurable at the 5% discount rate, and the remainder at the 3% rate.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals raises important and disturbing questions in the exercise of the diversity jurisdiction of the federal courts. May a federal court, in a breach of contract action, interpret the contract and measure damages without regard to the applicable state substantive law as to such matters? May such a court establish and apply a general federal law of contracts and damages in a suit between citizens of different states? And may a federal court deprive a defendant in a diversity suit of the right to a jury determination of disputed factual issues by the simple expedient of assuming the role of the jury and resolving all factual issues against the defendant?

These are significant questions that deserve plenary consideration by this Court. If the guiding rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, is to be respected and if the right to a jury trial of disputed facts is to be maintained in the federal courts, review of the decision below becomes not only appropriate but necessary.

I. May a Federal Court in a Diversity Suit Measure Damages for an Anticipatory Breach of Contract Without Regard to the State Substantive Law as to the Measurement of Such Damages?

The Court of Appeals below purported to determine "on the basis of insufficiency of evidence" that the sole measure of damages in this case was at the 5% discount rate. In so doing, however, the court expressly disavowed the necessity of deciding "what measure of damages rule is applicable, or whether the law of North Carolina or West Virginia applies." See p. 20a, *infra*. Instead, it established its own general rule—to wit, the measure of damages is "such as may reasonably be said to have been in the mutual contemplation of the

parties at the time of the execution of the contract." See p. 18a, *infra*. The court then determined from the evidence that the parties never contemplated that the 5% discount rate would ever be reduced to 3%.

Such a ruling raises a most serious question in the administration of the federal diversity jurisdiction. Since this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, it has been clear that in diversity suits of this nature the appropriate state law "should determine the requirements of the cause of action, the interpretation of the contract and *the measure of damages to be applied*." *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653, 656-657 (emphasis added). As noted in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, "It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." In other words, it is not within the competence of a federal court, in a diversity suit, to ignore the applicable state law as to measurement of damages for breach of contract or to fashion its own independent general rule. Nor can it do so as to matters of contract interpretation.

Yet the Court of Appeals has made and applied its own general standard of damage measurement in this diversity case. And it has expressly disregarded the necessity—imposed by the *Erie* doctrine—of discovering and applying the proper state law of damage measurement. Thus its conclusion that the petitioner failed to establish sufficient evidence to meet its own self-generated standard is both improper and valueless. The only relevant inquiry is whether petitioner presented sufficient evidence to permit a jury, under applicable state law requirements, to weigh the conflicting factors and to draw its conclusions as to the damages suffered

by the anticipatory breach of contract. That inquiry has yet to be made in this case.

Petitioner suggests that, since the so-called acceptance of the contract took place in North Carolina and since the pipes were to be delivered in North Carolina, the applicable law to be followed in interpreting the contract negotiations and in assessing the damages is that of North Carolina.[1] Had the court below, as was its duty under the *Erie* doctrine, made any effort to discover the North Carolina law as to the measurement of damages for anticipatory breach of contract and then assessed the facts in light of that law, it would have had to conclude that damages depend upon the best evidence available at trial time to show what the plaintiff's profits would have been in the normal course had performance actually taken place as contemplated.[2] Indeed, such is the law of West Virginia and of the overwhelming number of other jurisdictions and authorities that have dealt with this problem.[3]

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[1] See Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 260 (1910); 2 Beale, *Conflict of Laws* § 332.4 (1935); and see *Victorson* v. *Albert M. Green Hosiery Mills*, 202 F. 2d 717, 718, n. 2 (C.A. 3); *Wm. J. Lemp Brewing Co.* v. *Ems Brewing Co.*, 164 F. 2d 290, 293 (C.A. 7).

[2] *Bryant* v. *Southern Co.*, 192 N.C. 607; *Tillis* v. *Calvine Cotton Mills*, 251 N.C. 359. See also *Perkins* v. *Langdon*, 237 N.C. 159, 172-178; Note, 7 N.C. Law Rev. 462 (1929).

[3] "In other words, though the plaintiff sues at once for an anticipatory breach of the contract, his damages are to be assessed according to the cost of performance, not at the time of the breach, but at the time set for performance." Beale, *Damages upon Repudiation of a Contract*, 17 Yale L.J. 443, 448 (1908). See also 5 Corbin, *Contracts* § 1053 (1950); 3 Williston, *Sales* § 587 (Rev. ed. 1948); 2 Sedgwick, *Damages* § 636d (9th ed. 1912); Restatement, *Contracts* § 338, comment (a). See also *Roehm* v. *Horst*, 178 U.S. 1, 20; *Reliance Cooperage Corp.* v. *Treat*, 195 F. 2d 977 (C.A. 8); *Callan* v. *Andrews*, 48 F. 2d 118 (C.A. 2).

Applying that standard to this case reveals an evidentiary basis which would have required the submission to the jury of the question of what profits McJunkin would have earned had the contract been carried out. From the facts available at the time of trial, there was evidence from which the jury could have rationally concluded that McJunkin would have delivered only 58% of the pipe requirements during 1958, when the 5% rate was still in effect. And the jury could then have concluded that the remaining 42% would have been delivered—as the facts showed actually happened when petitioner had to secure pipe from other sources after January 1, 1959, when the 3% rate became effective. The total damages, under this theory, would have been materially less than the amount determined by the courts below.

The complete and acknowledged failure of the court below to determine the proper state law for measuring such damages and then to match the foregoing facts against that standard constitutes an abdication of the court's function under the *Erie* doctrine. See *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496. And it deprives petitioner of its right to a jury determination of this contested damage question in light of the proper state law. The same may be said as to the court's failure to treat the contract and breach questions in light of North Carolina law. A dangerous precedent has thus been created for ignoring the *Erie* doctrine. For that important reason, the invocation of this Court's certiorari jurisdiction is sought.

II. May a Federal Court, in Directing a Verdict Against the Party Not Having the Burden of Proof, Decline to View the Evidence in a Light Most Favorable to That Party and Thereby Deprive the Party of the Right to a Jury Trial?

An integral part of the failure of the court below to follow the commands of the *Erie* doctrine was its own injection into, and resolution of, two highly contested issues of fact: (1) Was there ever a contract between the parties and a breach thereof? (2) If there was a contract and a breach, what loss of profits was suffered by McJunkin? As to both of those issues the court below, as well as the District Court, found in favor of McJunkin without ever permitting the questions to go to the jury for resolution. And the court did so by formulating its own rules as to what constituted a contract, a breach thereof and the resultant damages. No mention was made of the North Carolina law on such matters. The Court's *Erie* function was disregarded.

It is elemental, of course, that it is beyond the function of either a federal trial judge or a federal appellate court to replace the jury in determining contested issues of fact. If the evidence at the trial fairly permits of different inferences and conclusions, only the jury can make the decisive determinations. As re-emphasized most recently in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. — (June 25, 1962), where all the evidence does not point in one direction, it is for the jury to weigh the contradictory evidence and inferences and to draw the ultimate conclusions as to fact. See *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 35. "The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desir-

able." *Commissioner v. Scottish-American Inv. Co.*, 323 U.S. 119, 124.

But in this case the courts below have entered into the arena of factual conflict with a vengeance. The very length of the opinion of the Court of Appeals stands as mute evidence of the extreme judicial intervention into matters reserved for the jury. That opinion might well reflect the considered opinion of a jury, had the case been submitted to it. Yet it cannot disguise the very real conflicts of fact which inhere in this trial record. The decision below is merely one view, one conclusion, which can be drawn from that record.

The court below, in sustaining a directed verdict in favor of the party having the burden of proving the determinative issues, reached the outer limits of the permissible area for the exercise of the power to take the case from the jury. The utmost of judicial restraint should be exercised in this context, viewing the evidence in a light most favorable to the opposing party. Indeed, to direct a verdict for the party having the burden of proof comes closest to infringement upon the Seventh Amendment's guarantee of jury trial rights in civil cases. Cf. *Galloway* v. *United States*, 319 U.S. 372, 395-396.[4] The evidence should thus have been viewed from the standpoint of whether the jury, had it believed petitioner's evidence, might rationally have found for the petitioner.

As to the question of the existence of a contract, there was substantial evidence that the parties never contemplated a completed contract until the financing of North Carolina's operations became secure. McJunkin

[4] See, generally, James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218, 226 (1961); Note, 107 U. Pa. L. Rev. 217, 219 (1958).

was made aware of these financing difficulties, made changes in the specifications as circumstances dictated, and informed its suppliers that delivery of the pipe depended upon funds being available to North Carolina. Even as late as May 27, 1958 (the date of the "cancellation" of the alleged contract), McJunkin was still seeking "a firm non-cancellable order" on the basis of North Carolina's "revised pipe requirements" in the event North Carolina "completes financing and proceeds with construction this year." D. Ex. 1; Tr. 54, 135.

Added to these facts was evidence that the custom of the trade permitted just such negotiations as here occurred to be considered as tentative until the resolution of a prime contingency, such as the procurement of necessary financing. Even so-called "cancellations" were considered part of the custom in the steel pipe business in such circumstances. Tr. 167. See *Henderson* v. *Pierson*, 201 F. 2d 740 (C.A. 10).

All of such evidence, admitted into the record, permitted an inference that in this context no firm contract was ever formulated, or that, if such a contract existed, it was by custom subject to unilateral cancellation. The fact that the court below felt that a different inference was required merely reflects the contested nature of the issue and the necessity for allowing the trier of facts—the jury—to draw the inference that it considers most reasonable. Additionally, of course, the court below made no effort to find or apply the North Carolina law of contract interpretation.

The same is true as to the issue of damages. Here again the evidence as to the losses actually suffered by McJunkin was a matter of irreconcilable dispute, compounded by the failure of the courts below to apply the proper state law as to the measurement of damages. As already indicated, evidence was available to permit

the jury, properly instructed, to find that had the alleged contract actually been consummated, at least 42% of McJunkin's profits would have been computed at the lower 3% discount rate. To ignore the possibility of such a conclusion, to insist upon the computation at the higher 5% rate for all lost profits, is to invade the function of the jury and to abuse the power to direct a verdict.

What the court below has done is to disregard the *Erie* doctrine as to both the contract and damage issues, to establish its own rules in those respects, and to measure the evidence in light of those rules. And it has compounded such errors by declining to view the evidence in a light most favorable to the party against whom the verdict was directed.

To preserve the historic function of the jury in the federal court system, and to guarantee the right of litigants to a jury determination of contested issues of fact, a review of the decision below is requisite.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit should issue.

Respectfully submitted,

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